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REPORT
No. 717

IMMUNITY OF WITNESSES APPEARING BEFORE CONGRESSIONAL COMMITTEES

AUGUST 27 (legislative day, AUGUST 1), 1951.—Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1570]

The Committee on the Judiciary, to which was referred the bill (S. 1570) to amend the immunity provision relating to testimony given by witnesses before either House of Congress or their committees, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended do pass.

PURPOSE

The purpose of the proposed legislation is to provide an effective immunity statute under which, in proper case, a witness can be compelled to testify in spite of a claim of possible self-incrimination.

GENERAL DISCUSSION

The present immunity statute affecting witnesses before congressional committees fails to give such witnesses a degree of protection as broad as their constitutional privilege against self-incrimination. For this reason, the present statute fails to accomplish its purpose of putting a congressional committee in a position to require a witness to testify, even with respect to matters which might incriminate him.

With this situation in mind, the chairman of the Judiciary Committee on February 22, 1951, submitted to all members of the committee copies of a draft of a proposed new immunity statute. (A copy of the chairman's letter of February 22, 1951, is attached as appendix A of this report.)

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After discussion of Senator McCarran's proposal in the full committee, a subcommittee was appointed to study the matter. Subsequently, Senator McCarran's original proposal was introduced by him as a bill, to form a basis for subcommittee action, and became S. 1570.

The important difference between the proposal embodied in S. 1570 and the existing immunity statute which it is proposed to replace is that the present law provides, in effect, that no testimony which the witness gives may be used against him in any subsequent criminal prosecution; whereas the proposed new law adopts the language which has been approved by the Supreme Court in several instances, and provides that the witness shall not be prosecuted on account of any transaction, matter, or thing concerning which he is compelled to testify.

The proposed new law is carefully worded so that the witness would not get an "immunity bath" by the mere fact of testifying. He would have to raise specifically his claim for privilege, and thus put the committee on notice that it was faced with a decision as to whether, for the greater good, the witness should be required to testify (and thereby given immunity with respect to the matters concerning which he testified) or whether it was better to excuse the witness from testifying, and seek the information elsewhere, in order to preserve possible rights of criminal action against the witness.

It is recognized that this will be a serious decision in any case; but at the present time, under the existing immunity statute with respect to witnesses before congressional committees, a committee has no choice at all. Even though a committee should decide unanimously that it was worth while to let a particular witness have immunity from prosecution for possible wrongdoing, in order to elicit testimony of importance to the national welfare, there is actually no way in which the committee can compel such testimony if, in fact, it touches upon some previous wrongdoing of the witness in such a way as to incriminate him within the meaning of the constitutional provision.

Attention should be called to the fact that, by adoption of the amendment proposed by Senator Ferguson, the committee has written into this bill a provision under which the decision to grant a witness immunity in exchange for his testimony will be made not by a single member of the committee, but by at least two-thirds of the committee, including at least one member of the minority party. This makes it certain that a grant of immunity will not be decided upon lightly. In this connection, it should be noted that the decision to offer a witness immunity in exchange for his testimony may be made by two-thirds of the members of the full committee either in advance of calling the witness, or after he has refused to testify on grounds of possible self-incrimination. The important requirement here is that the grant of immunity shall have been authorized by affirmative vote, concurred in by at least two-thirds of the members of the full committee, including at least one member of the minority party having the largest representation on such committee. It should be further noted that in the event the extension of immunity is authorized in advance of the calling of the witness, it would still be necessary for the witness to claim his privilege against testifying, on grounds of possible self-incrimination, before the immunity could be granted. In other words, the immunity will arise only after the witness has first claimed his privilege against testifying on grounds of possible self-

incrimination, has then been specifically directed to answer, under the terms of the proposed statute, and has then proceeded to testify.

AMENDMENTS

1. On page 1, line 6, strike out "person" and insert in lieu thereof "witness".

(This is a technical amendment, the purpose being to dispose of any question as to the "natural" nature of persons affected by the law.)

2. Page 1, line 6, strike out "attending and".

(The words "attending and" are being deleted because of the feeling that to include them might give rise to confusion, in view of the fact that the privilege against self-incrimination does not affect the duty to appear, the latter being covered by 2 U. S. C., sec. 192.)

3. Page 1, line 7, strike out "documentary evidence" and insert "books, papers and other records and documents."

(Substitution of the phrase "books, papers and other records and documents" for the phrase "documentary evidence" appears preferable as a means of avoiding any difficulties which might arise over possible construction of the word "evidence".

4. Page 1, lines 9 and 10, strike out: "established by a joint or concurrent resolution".

(The phrase "established by a joint or concurrent resolution" is eliminated as surplusage. Actually, any joint committee of the two Houses of Congress is to come within the purview of the act, whether established by a joint or concurrent resolution, or by an act of Congress.)

5. On page 2, line 3, after "forfeiture", insert the following:

, when the record shows that two-thirds of the members of the full committee, including at least one member of the minority party having the largest representation on such committee, shall by affirmative vote have authorized that such person be granted immunity under this section with respect to the transactions, matters, or things concerning which, after he has claimed his privilege against self-incrimination, he is nevertheless compelled by direction of the Chair to testify.

(This is the so-called Ferguson amendment, its purpose being to require that two-thirds of the members of the full committee shall concur in the decision to grant immunity to a witness, in order to make such decision effective.)

6. Page 2, beginning at the end of line 3, strike out "natural person" and insert in lieu thereof "such witness".

(This is a technical amendment to bring the language of this sentence into line with the language of the first sentence as amended.)

7. Page 2, line 8, strike out the comma after the word "testify".

(This is a purely technical amendment.)

8. Page 2, line 12, after the word "perjury" insert "or contempt".

(The purpose of this amendment is to meet the difficulty suggested in *U. S.* v. *Bryan* (339 U. S. 33 (1949)), in which a minority of the court held that testimony given under the present statutory privilege could not be introduced in a prosecution for contempt committed in the course of such testimony. Although the possibility of a witness refusing to testify because he might thereby subject himself to prosecution for contempt (a Federal crime under 2 U. S. C., sec. 192) is perhaps remote, the insertion of two words as provided by this amendment will eliminate such possibility completely.)

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown below in parallel columns as follows (existing law is enclosed in black brackets, new matter is printed in italics):

§ 3486. *Testimony before Congress: immunity*	§ *Testimony before Congress: immunity*
[No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.]	*No witness shall be excused from testifying or from producing books, papers and other records and documents before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture, when the record shows that two-thirds of the members of the full committee, including at least one member of the minority party having the largest representation on such committee, shall by affirmative vote have authorized that such person be granted immunity under this section with respect to the transactions, matters, or things concerning which, after he has claimed his privilege against self-incrimination, he is nevertheless compelled by direction of the Chair to testify. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or an account of any transaction, matter, or thing concerning which after he has claimed his privilege against self-incrimination he is nevertheless so compelled to testify or produce evidence, documentary or otherwise.* *No official paper or record required to be produced hereunder is within the said privilege.* *No person shall be exempt from prosecution or punishment for perjury or contempt committed in so testifying.*

APPENDIX A

FEBRUARY 22, 1951.

Hon. ARTHUR V. WATKINS,
United States Senate, Washington, D. C.

MY DEAR SENATOR WATKINS: Attached is a draft of a proposed new congressional immunity statute. On Monday I will propose that the committee consider reporting this to the Senate as an original committee bill. Therefore, I hope you may be able to give it attention between now and then.

The need for revision of the existing congressional immunity statute (18 U. S. C. 3486) is growing increasingly apparent.

In *U. S.* v. *Bryan* (1950) (339 U. S. 323, 335–336) Mr. Chief Justice Vinson pointed up the need for amending this provision when he stated that merely prohibiting the use of testimony given by a witness before any committee of either House in a subsequent criminal proceeding against him is not sufficient as a substitute for the constitutional privilege in that it is not a complete immunity from prosecution for any act concerning which he has testified. Consequently, the original purpose of the statute was effectively nullified in *Counselman* v. *Hitchcock* (1892) (142 U. S. 547), and a congressional witness therefore can claim his privilege and remain silent with impunity.

The type of language which will satisfy the constitutional requirement is indicated in *Heike* v. *U. S.* (1913) (227 U. S. 131), construing 15 United States Code 32. The language is that act reads: "No person shall be prosecuted * * *, etc."

The recent decision of the Supreme Court in the Blau case (*Blau* v. *U. S.*, decided December 11, 1950, Docket 22, October term, 1950) makes it clear that the Judiciary Committee of the Senate, because of its Internal Security Subcommittee, now has a special interest in this problem of congressional immunity.

The Blau case is authority only for the proposition that an answer to a question concerning membership in or affiliation with the Communist Party may be incriminatory. Under this holding, however, and under the doctrine in *U. S.* v. *Bryan*, it appears probable that witnesses before congressional committees can, with impunity, refuse to answer questions of this nature.

The proposed new statute has no special application to Communists but would eliminate this problem as well as their claims of privilege by granting an immunity as broad as the constitutional privilege itself.

In order to avoid application of the doctrine declared in *U. S.* v. *Monia* (1943) (317 U. S. 424), the proposed statute has been drafted so as to specifically require the witness to claim his privilege in order to secure the immunity.

I hope you will plan to attend Monday's meeting of the committee so that you may express your views with respect to this proposal.

Kindest personal regards.

Sincerely,

PAT MCCARRAN, *Chairman.*

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